



European
University
Institute

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EUI Working Papers

RSCAS 2011/49

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
Private Regulation Series-06

ENFORCEMENT OF TRANSNATIONAL PUBLIC
REGULATION

Richard B. Stewart

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
PRIVATE REGULATION SERIES-06

Enforcement of Transnational Public Regulation

RICHARD B. STEWART

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

This paper has been delivered within the context of the research project:
Transnational Private Regulatory Regimes: Constitutional foundations and governance design
Co-financed by HiiL (Hague Institute for the Internationalisation of Law)

www.hiil.org

www.privateregulation.eu



© 2011 Richard B. Stewart

Printed in Italy, December 2011

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu/RSCAS/Publications/

www.eui.eu

cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Stefano Bartolini since September 2006, aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre is home to a large post-doctoral programme and hosts major research programmes and projects, and a range of working groups and ad hoc initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

Hague Institute for the Internationalisation of Law (HiiL)

HiiL is a research and funding institute for the internationalisation of national law. Primary aim is to explore how national legal orders can function effectively in a world where the interconnectedness of societies – and thus their legal systems – is a fact of life. HiiL encourages, initiates, facilitates, and funds research on these issues and takes an active part in the international debate.

For more information on HiiL research themes and research projects see: <http://www.hiil.org/research>

Private Regulation Series

The Private Regulation Series was started in June 2009 at the RSCAS. It promotes research in the area of private regulation in a multidisciplinary perspective. It is coordinated by Professors Fabrizio Cafaggi, Colin Scott and Linda Senden.

The Series focuses on the new combinations of public and private power in transnational governance prompted by the emergence of transnational private regulatory regimes. It addresses the constitutional foundations, emergence and dissolution of private regulatory regimes in different sectors. These include, among others, financial markets, corporate social responsibility and protection of fundamental rights, consumer protection and technical standardization, e-commerce and food safety.

This series of working papers aims at disseminating the work of scholars and practitioners on regulatory issues.

For further information

Prof. Fabrizio Cafaggi
European University Institute
Via Boccaccio 121, 50133 Firenze – Italy

Phone: +39.055.4685.516 / 241

Email: Fabrizio.Cafaggi@eui.eu

Email: Federica.Casarosa@eui.eu

Abstract

This essay provides an overview of enforcement mechanisms and issues in transnational public regulation. Regimes of transnational regulation (environment, finance, security, intellectual property, etc.) established by states and networks of domestic government officials use a variety of regulatory instruments, including economic incentives. Lack of consistent enforcement undermines the efficacy of these regimes. The paper examines legal remedies, including those provided by Global Administrative Law, that may be asserted against domestic and international administrative bodies in order to address enforcement gaps in transnational regulation. These include remedies invoked by the beneficiaries of regulatory regime to promote enforcement and regulatory protection by such bodies

Keywords

Transnational Public Regulation; Global Administrative Law; Enforcement of Transnational Regulation

I. Introduction

Enforcement of transnational public regulation is a vast topic. This essay deals with selected aspects of the subject to focus on issues that are instructive, by way of comparison and potential synergy, with issues of private transnational regulation that are the central concern of this volume. It addresses transnational regimes established by treaties among states, by agreements among international organizations (e.g., Codex), or by agreements among networks of government agencies and officials, aimed, directly or mediately, at coordinated regulation of private market actors' conduct.¹ It also considers the important role in enforcement of transnational regulatory administrative authorities established pursuant to such arrangements and the role of Global Administrative Law (GAL).

Examples of the fields covered by transnational public regulation include environmental health and safety ("EHS"), consumer protection, investment, financial products and services, intellectual property, and competition. Generalizing across such a wide variety of regimes and fields of regulation presenting very different circumstances and considerations, is hazardous, but I will endeavor to provide a general framework. Because I am most familiar with EHS regimes and US law, many of the examples discussed herein will be drawn from them.

The essay does not deal with arrangements among domestic or transnational agencies for mutual recognition or recognition of regulatory equivalence. Because of the EC's distinctive supranational legal and administrative structure, it does not treat the EC as a transnational regulatory regime. It does not deal with transnational liability regimes providing compensation for harms caused by private actors, although these may certainly have strong regulative effects.² The essay also does not address transnational application of one country's regulatory or liability laws (including laws that may be based or are claimed to be based on global regulatory norms) to activities or actors abroad.³ Further, the essay does not systematically address relations between transnational public regulation and transnational private regulation, including co-regulation and hybrid, nested, or coordinated public and private regimes, and the various ways in which they may be regarded as complements or substitutes.

Regulatory enforcement

This essay focuses on systems of regulation involving enforcement actions brought by public authorities or private plaintiffs against actors subject to public regulatory requirements. These include administrative orders requiring or prohibiting specified conduct, administrative imposition of penalties, criminal prosecutions; and civil actions brought by governmental officials for specific relief or civil penalties, in all cases backed by the coercive power of the state. In the era of the regulatory welfare state, enforcement can also include governmental denial or revocation of permits or licenses to carry on productive activities or denial or withdrawal of state-provided grants and other forms of financial assistance for failure to meet specified requirements or conditions. Such conditions have become a highly important regulatory tool. Domestic systems of constitutional and administrative law increasingly provide legal protections analogous to those provided in cases of coercive sanctions to

¹ While these various regimes often have different names, such as "international", "intergovernmental" etc., I term them all transnational in accordance with the terminology of this volume.

² International agreements increasingly provide for strict liability, often on private actors, for environmental harm to other states or the global commons. Examples include agreements relating to marine oil pollution, carriage at sea of hazardous and noxious substances, interstate impacts from nuclear power accidents, and transboundary shipments of hazardous wastes. Negotiations are pending to establish liability systems for transboundary shipments of genetically modified organisms (GMOs) under the Cartagena Protocol. Common characteristics of such regimes include strict liability, liability channeling, liability limits, and compulsory insurance.

³ See Hannah Buxbaum, "Transnational Regulatory Litigation" 46 *Va. J. Int'l L.* 252 (2006); Christopher Whytock, "Domestic Courts and Global Governance" 84 *Tulane L. Rev.* 67 (2009).

persons denied such advantageous opportunities because of failure to meet regulatory conditions. Enforcement also includes civil actions, sometimes termed “citizen suits,” or “private attorney general” actions, by private plaintiffs against regulated actors to enforce regulatory compliance or sanction violations.

In defining regulation as involving enforcement of conduct requirements or prohibitions, this essay follows what Neil Walker has identified as the narrow view of regulation – one shared by most lawyers - as distinguished from a broader view of regulation that encompasses other norm-based practices and institutions that shape conduct in regular patterns, including much network regulation and elements of new governance.⁴

In addition to enforcement, this essay discusses “upstream” legislative and administrative measures to implement regulatory programs and help assure compliance by market actors, including programs for monitoring, record keeping, and reporting. It also briefly considers collateral incentives for compliance by regulated actors with public regulatory norms, such as avoidance of tort liability or the demands of supply chain partners. Also highly relevant, but not systematically addressed herein, is the suite of “responsive regulation” tools other than enforcement that public authorities, transnational or domestic, may apply to promote compliance.⁵

A core (but perhaps contestable) premise of this essay is that credible and effective enforcement, as defined above, is essential to many and probably most public regulatory regimes, including transnational regimes. Enforcement also carries an epistemological premise, namely that the legal system is capable of distinguishing whether a regulated actor is or is not in compliance with regulatory requirements, which in turn implies that applicable regulatory norms have a suitably hard-edged character that will support such distinctions.⁶ Thus, I do not regard regulatory systems that rely *solely* on “soft” norms, peer review mechanisms, and other reputational incentives as involving enforcement, even if effective in promoting compliance, although enforcement-based regulatory systems may also include or be supplemented by such arrangements.

Transnational regulatory administration and Global Administrative Law

A striking feature of contemporary transnational public regulation, in common with many other elements of global governance, is the powerful decision making role of transnational administrative bodies, including the management and staff of international organizations, network institutions, various committees and councils, and other expert and specialized groups. States and agencies party to transnational regulatory regimes have delegated responsibility to such bodies to particularize and revise regulatory norms and take steps to promote and oversee their implementation and enforcement. These administrative bodies respond to the need to continuously monitor and manage regulatory implementation and make necessary adjustments to improve performance and respond to changing circumstances and demands, all of which require organizational specialization, initiative, flexibility, and dispatch. The old international law model of treaties interpreted and applied on a wholly decentralized basis by signatory states is not capable of meeting contemporary regulatory demands, which require coordinated and consistent regulation of actors operating in global markets in order to redress market failures and secure collective goals

Increasingly, global regulatory administrative bodies determine the detailed content of the primary regulatory norms defining the conduct prescribed or recommended, as well as the secondary norms

⁴ Neil Walker “On Regulating the Regulation of Regulation” in Fabrizio Cafaggi (ed) *Reframing Self-regulation in European Private Law* (Kluwer, 2006) pp. 347-357

⁵ See for example, John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making it Work Better* (Edward Elgar, 2008)

⁶ I am indebted to Bill Simon for this point.

governing arrangements and procedures for implementation and enforcement. The growth of these extrastatal administrative authorities, operating below or beyond the reach of treaty-based consent by states, raises profound and unresolved challenges of legitimacy and accountability. The premise of GAL is that these challenges can be addressed, in part, through the application of administrative law tools of transparency, participation, reason-giving and review to many elements of regulatory decision-making by the new global administrative bodies. These GAL principles and practices are increasingly being recognized and followed by transnational administrative bodies and tribunals.⁷

A focus of this essay is the availability of legal remedies and other mechanisms to promote effective implementation and enforcement of transnational regulatory programs and thereby enhance protection of regulatory beneficiaries, including tools to address failures by either transnational or domestic administrative authorities to effectively or appropriately implement and enforce regulatory norms. These measures include the GAL procedural norms, and remedies that regulatory beneficiaries may assert against regulatory agencies, domestic or transnational, for regulatory failures and violations. They also include private enforcement or damages actions brought by regulatory beneficiaries as “private attorneys general” against regulated actors pursuant to public regulatory regimes. Remedies may be established under domestic or transnational law, and may be enforced by either domestic or international administrative bodies or courts. The relation among these remedies, including the extent to which they are substitutes or complements, as well as their implications for collateral compliance incentives, must also be considered. A key issue is the interplay between public enforcement, private actions and collateral compliance incentives.

II. Transnational Treaty or Network Regulatory Regimes for Addressing Market and Decentralization Failures

Transnational regulatory regimes are (in ideal theory) established to address twin institutional failures: (1) market failures; and (2) decentralization failures resulting from the inability of states acting independently though purely domestic measures to adequately or properly regulate market actors in circumstances of global economic regulation and transnational externalities. They may also (again in ideal theory) be understood as responses to failures or limitations of transnational private regulation.⁸

The various elements and dimensions of market failures cannot be rehearsed here, except to note that classical analysis of public regulation generally ignores the potential for, and possible roles of, private regulation and co-regulation.

In the case of products, decentralization failures often take the form of transactions costs and impediments to scale economies resulting from differing and potentially conflicting national standards. The response is a transnational regime, public, private, or hybrid, to establish uniform or approximated product regulatory standards and, often, implementing arrangements. Informational asymmetries and domestic regulatory failures in developing countries may also account for product regulatory regimes such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Regulation of production and process measures (PPMs) are justified by various forms for transnational non-pecuniary externalities (global or regional pollution, biodiversity loss) or, much more doubtfully,

⁷ An overview of GAL is found in Benedict Kingsbury, Nico Krisch and Richard B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemp. Probs* 15 (2005). See also S. Cassese, B. Carotti, L. Casini, M. Macchia, E. McDonald, M. Savino (eds), *Global Administrative Law: Cases, Materials, and Issues* (2 ed, 2008) (www.iilj.org/GAL/GALCasebook.asp). Information on the activities including conferences and publications of the Global Administrative Law research project at NYU Law School, conducted with partners in many other countries, can be found at www.iilj/GAL.

⁸ Transnational private regulation may be similarly understood as a response to market and decentralization failures and the failures or limitations of transnational public regulation. Sustainable forestry certification regimes are an example.

the risk of a “race to the bottom” in domestic regulation resulting from international competitiveness factors and pecuniary externalities. Transnational regulation of financial and other services (e.g., banking regulation) often represents an intermediate case with characteristics of both product and PPM regulation. Other factors, including the desirability of tailoring regulation to differing local circumstances and preferences, or the potential desirability of competition among diverse regulatory systems, may limit regulatory harmonization.

While functional considerations derived from mutually beneficial opportunities for regulatory coordination or cooperation among states, as well as constructivist factors, play both an explanatory and justificatory role in transnational regulatory regimes, interest-based political economy drivers are also critical. These may be modest and manageable in situations having the characteristics of coordination games, where all participants have an interest in uniform “rules of the road” for transactions and other activities, and the choice of rule does not have significant distributional consequences. Technical standards for products and services often approximate this situation. Situations having the character of cooperation games involving the need for concerted action to achieve collective goods under conditions that invite free riding, especially in circumstances where defining the terms of cooperation generates major conflicts over the distribution of burdens and benefits, present much greater difficulties in a global setting in which each participating state or domestic or global agency must voluntarily assent to a cooperation scheme and domestic interests exert significant power.

In circumstances of free trade in goods and services and capital mobility, industries in heavily regulated jurisdictions often favor extension of stronger regulation to other jurisdictions with less stringent regulation in order to avoid competitive disadvantage, while firms in those jurisdictions correspondingly resist harmonization. If the former fail to achieve “harmonization up,” regulatory competition among jurisdictions may, in some cases, depress the overall level of regulation. Under other circumstances, “race to the top” incentives for technological or product quality leadership may result in regulation at a high level in many jurisdictions as a result of competition among firms and regulating states. Regulatory beneficiaries in a given jurisdiction sometimes oppose transnational regulation as involving “leveling down,” but in other circumstances view it as an opportunity to enhance the level of domestic regulatory protection. International and transnational NGOs often support regulatory harmonization to increase the level of protection globally or in certain nations, such as developing countries. Harmonization may also be resisted or distorted by a variety of other local political and institutional factors. Transnational regulatory harmonization may be partial, addressing some elements while leaving others, or it may secure a degree of convergence falling short of uniformity, for example by setting minimum standards while allowing states discretion to adopt more demanding standards, either generally or in specified circumstances.

III. Implementation and Enforcement of Transnational Public Regulation

The objectives of transnational regulation, including harmonization and enhanced regulatory protection, will not be achieved unless the regulatory norms adopted –whether by agreement among states, international organizations, or networks of government officials or by decisions of transnational administrative bodies - are effectively implemented and enforced against market actors operating in and across different jurisdictions. Otherwise only “Potemkin harmonization” will be achieved. In a *vertical perspective*, public transnational regulation, whether established by treaty or network accord, traditionally operates at two levels: regulatory norms are adopted at the transnational level, while responsibility for implementation and enforcement is allocated to states and domestic agencies. Although instances of direct regulation of private actors by transnational administrative authorities are beginning to appear, transnational enforcement remains relatively rare. In a *horizontal perspective*, unless enforcement and other arrangements secure fairly consistent compliance by all market actors, the benefits anticipated from coordinated or cooperative measures to address market/decentralization failures and “harmonize up” will not be realized. Accordingly, adoption at the global level of more or

less uniform secondary norms and measures to harmonize and promote effective implementation and enforcement by different states and domestic agencies of primary global regulatory may be needed to secure regulatory goals. Further, there must be adequate global arrangements to ensure that states and domestic agencies comply with these secondary norms and measures.

Decentralized domestic implementation and enforcement of transnational regulatory norms may fail for several basic reasons. First, governments or agencies may fail to agree on specific primary or secondary norms, either because of disagreement or uncertainty over norms, bargaining failures, or the need for flexibility to deal with future changes in political and economic circumstances and information. Subsequently, different domestic agencies and courts in different jurisdictions may interpret the agreed but general or ambiguous norms in different ways.⁹ Second, governments or agencies may decide for a variety of political and policy reasons not to carry out their undertakings. They may wish to avoid imposing regulatory burdens on, or otherwise favor, domestic producers and prefer to free ride on other states' efforts. New information or changing circumstances may lead them (influenced by powerful domestic constituencies) to regard the agreed requirements as imprudent, impracticable, or of lesser priority.¹⁰ Third, states or agencies may lack legal and administrative capacity to effectively implement the agreed norms. Fourth, the agreed regulatory instruments and strategies may have intrinsic efficacy limitations.

Transnational public regulatory regimes undertake measures to address these several sources of implementation and enforcement failure, including the creation of transnational regulatory administrative bodies. These bodies develop and adopt more specific primary regulatory norms in the form of regulations, standards and guidelines and periodically revise them in light of evolving conditions and accumulating experience. They may include centralized dispute settlement mechanisms to interpret, clarify and thereby promote more consistent application of regulatory norms. Many regimes include administrative bodies for compliance review, compliance assistance, and sanctioning; they may adopt incentives for state compliance such as trade sanctions and subsidies overseen by administrative bodies; carry out capacity building programs through administrative bodies; and adopt more effective regulatory instruments and strategies. Further, transitional regulatory regimes increasingly establish, very often by administrative decisions, secondary norms specifying implementation (and sometimes enforcement) procedures and measures that participating states and agencies must follow. Transnational administrative bodies orchestrate networks of domestic agencies to share experience and best practices, promote peer review, receive and compile reports from participants, and track performance. The administrative bodies that devise and manage these systems of implementation information and review can then undertake needed adjustments to the regime to improve regulatory efficacy and recommend changes to the founding parties.¹¹ Bilateral aid programs and multilateral development banks play an important complementary role through programs to strengthen legal and administrative capacities in developing countries and thereby enhance their ability to implement global regulatory norms.

In addition, where powerful states like the US place a high priority on global regulatory efficacy in specific areas, they exercise political and economic leverage to push other states to implement and

⁹ Catherine Redgewell, "National Implementation", in Ellen Hay, Jutta Brunée & Daniel Bodansky (eds), *The Oxford Handbook of International Environmental Law*, 936-7 (2007 OUP) (hereinafter "Oxford Handbook")

¹⁰ Pierre-Hugues Verdier, "Transnational Regulatory Networks and their Limits", 34 *Yale J. Int'l L.* 113 (2009); Kenneth Abbott and Duncan Sindal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit", 42 *Vand. J. Transnat'l L.* 501 (2009) (analyzing breakdown of implementation and enforcement of Basel Committee regulation of banks because of divergences in interests among major economy banks due to changing circumstances)

¹¹ Kal Raustiala, "Compliance and Effectiveness in Regulatory Cooperation", 32 *Case West. Res. J. Int'l L.* 387 (2000), at 415-22. The OECD network regime for mutual assurance of non-clinical chemical safety test data illustrates many of these strategies. See James Salzman, "Decentralized Administrative Law in the Organization for Economic Cooperation and Development", 68 *Law & Contemp. Probs* 189 (2005), at 200-206.

enforce regulatory controls, as illustrated by the Financial Action Task Force (FATF) anti-money laundering regime.¹² Under trade-based and transactions-based regulatory regimes, such as CITES, the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal, the Cartagena Biosafety Protocol, and the FATF, compliance with global regulatory norms can be policed by both of the states involved in a transnational transfer or transaction.

It is increasingly recognized that public access to information and participation at the level of domestic decision-making can make a vital contribution to effective implementation and enforcement of transnational public regulation, especially in fields such as environmental and consumer protection, and human rights. The Aarhus Convention establishes a transnational system of secondary regulatory norms for public information, participation, and access to justice in environmental cases. These arrangements strengthen the domestic political influence of regulatory beneficiary NGOS and also provide a platform for their assertion of administrative and judicial enforcement remedies, as discussed below. They also facilitate organization and mobilization of transnational NGO networks to promote regulatory initiatives and implementation, both at the level of the transnational regime and at the domestic level.

Mechanisms that operate to harmonize domestic regulation in the absence of any agreements among states or domestic agencies should be noted. Regulatory competition among states, coupled with the ability of regulated firms or persons to relocate or otherwise choose to be governed by the regulation of a given state may promote harmonization in certain regulatory fields. Network effects may also produce common standards for products or services without any transnational agreements. The WTO regime may generate incentives for states to adopt applicable international standards in order to defend against challenges to their domestic regulations under the SPS and TBT agreements. Emulation and other constructivist influences may also promote regulatory convergence. These mechanisms, however, lack transnational governance arrangements, and as a result may often fail to secure harmonized or effective implementation and enforcement.

IV. Regulatory Instruments and Compliance Mechanisms

An important component in the design and performance of transnational public regulatory regimes is the type of regulatory instrument used for securing compliance with regulatory requirements.¹³

Command and control instruments

Generally, transnational public regulatory regimes either define regulatory norms in general terms that allow states discretion as to which regulatory instruments to use, or call for the use of command and control measures that prohibit or mandate specified conduct by regulated actors. Where discretion is afforded, states and domestic agencies have generally used command instruments. In effective command regulatory systems, domestic authorities specify more detailed conduct requirements through administrative rulemaking or adjudication (including conditions in licenses and on grants and other forms of government assistance) and enforce them against regulated actors in case of violation. A notable recent development is the rise of transnational regulatory regimes that call on domestic agencies to regulate conduct through financial conditionality. An example is the OECD program that calls on domestic export credit agencies to apply social and environmental conditions on assistance to domestic firms.¹⁴ Financial conditionality can also be used by transnational administrative bodies to

¹² See Kal Raustiala, "The architecture of international cooperation: transgovernmental networks and the future of international law" 43 *Va. J. Int'l L.* 1 (2002), at 73-74.

¹³ For discussion in the field of environmental regulation, see Richard Stewart, "Instrument Choice", in *Oxford Handbook*, note 9 above, at 936-7 (2007)

¹⁴ The OECD "Common Approaches" is discussed further in James Salzman, note 11 above, at 206-212.

promote enforcement by domestic agencies. For example, the World Bank and IMF condition financial assistance to governments on the condition that they follow and enforce Basel regulatory norms on their banks.

Under many systems of domestic constitutional and administrative law, regulated actors can invoke procedural and judicial review in defense of government enforcement actions. In some systems these rights attach to upstream administrative actions (such as rulemaking or licensing) to specify and apply regulatory norms prior to the enforcement stage. Increasingly, in many jurisdictions domestic constitutional and administrative law has extended procedural and judicial review rights to regulatory beneficiaries to promote their interests in regulatory decision making by domestic agencies. In certain cases, beneficiaries may also have rights under domestic regulatory law to enforce or maintain liability actions against regulated firms for damages caused by regulatory violations. Private treble damages actions under the US antitrust laws are a prominent example.

While global regulatory regimes generally leave a fair amount of discretion to states and agencies regarding enforcement, there are some recent examples of a far more directive approach.. Notable examples are found in the international security field, which powerful states regard as imperative. The Security Council and its 1267 Committee have mandated that UN member states freeze the assets of, and deny entry to, persons listed by the Committee as financing terrorism. The Financial Action Task Force has developed a stringent regime requiring participating governments to police money laundering by regulating domestic financial institutions and their transactions. The Montreal Protocol is an example in the environmental field of a command and control regime where major developed countries regarded stratospheric ozone protection as a paramount global objective warranting use of trade sanctions, side payments to developing countries, and a strong transnational administrative compliance system to ensure that all states comply with restrictions on production and use of ozone-depleting chemicals.

Market-based and information-based regulatory instruments

Because of the dysfunctions encountered by governments in attempting to extend and intensify command and control requirements to meet increasingly ambitious regulatory goals, many developed and some developing countries have adopted market-based and information-based regulatory instruments as a supplement or alternative to traditional approaches. Rather than dictating conduct, these tools steer the conduct of regulated firms in the desired direction by directly imposing a price on disfavored conduct or mobilizing consumers, investors, and the public generally to reward firms and products with superior regulatory performance and shun those with inferior records.

Although the modern regulatory state, at least in developed countries, enjoys ample power, a virtually unrelenting reliance on command regulation has made the state an increasingly maladroit and arbitrary regulator. In the global setting, on the other hand, the problem is the relative weakness of institutions. Market-based and information-based programs can potentially address both types of problems. An important issue for transnational regulation is whether economic and information-based instruments can, through their mobilization of the price and market system and non-governmental interests and incentives, better compensate for those weaknesses than command-and-control regulation. Here, a key consideration, much debated in the climate regulatory context, is the relative institutional demands, including demands for monitoring, verification, and enforcement capacities, of emissions taxes and quota-trading programs relative to command instruments

Although they allow regulated firms flexibility in the means of achieving regulatory objectives, the new tools generally involve requirements on the regulated that must be enforceable through methods ultimately based on government coercion. Thus, in emissions trading or tax systems firms must hold quotas or credits or pay taxes equal to their true emissions. In information systems, they must accurately report and disclose the information required. Compliance by regulated firms with the requirements of market incentives (e.g., payment of taxes on emissions) and information disclosure

must be enforced, but because these forms of regulation do not involve detailed conduct requirements there may be less scope for legal remedies by regulatory beneficiaries in the design and implementation of the regulatory program

The development of innovative regulatory instruments in the public transnational context is still at an early stage. The most notable example of market-based instruments is the use of tradable emissions quotas and credits under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, including Joint Implementation (JI) and the Clean Development Mechanism (CDM). The CDM and similar transnational emissions trading systems will play a major role in mobilizing private investment from developed countries to achieve greenhouse gas emissions reductions in developing countries and mitigate climate change.¹⁵ Enforcement requires tracking of quota or credit holdings, accurate emissions monitoring and reporting, and sanctions for failure by sources to hold quota/credits equal to their emissions. Another emerging market-based regulatory approach is the use of Individual Transferrable Quotas (ITQs) for regional high seas fishery management. A significant feature of these instruments is that the regulatory markets operate transnationally, with purchases and sales occurring across jurisdictions as well as within participating jurisdictions. This necessitates effective transnational administrative authorities to ensure the uniform and proper functioning of transnational markets and, with them, of the component domestic markets.

Market-based regulatory mechanisms create powerful incentives for effective transnational monitoring and enforcement assurances because cheating undermines the financial integrity of the market as well as its environmental performance. The Executive Board of the CDM, a transnational administrative authority, has developed an elaborate system of review, verification and enforcement to meet these requisites. Non-state actors, including NGOs, play an important role in the processes of monitoring and determining compliance. Market based transnational regulatory systems can also mobilize market mechanisms to promote compliance by, for example, adopting buyer liability for excess emissions under emissions trading regimes. Under buyer liability, emissions quotas or credits sold by a non-complying source of contract-based incentives are invalidated or discounted based on the violation. This prospect will lead credit and quota buyers to demand compliance assurances through contractual provisions or otherwise that will, in turn, promote compliance.

Information-based systems can mobilize consumers, socially responsible investors, and other regulatory beneficiaries to favor products, services and firms with high levels of regulatory performance and avoid those with inferior performance. They can do so through the use of product labels, or publication and dissemination of information on performance. Public transnational examples of such programs that effectively regulate private actors include the OECD anti-bribery program, the World Bank's anti-corruption program, and the requirements in the Biosafety Protocol for GMO labeling and disclosure of risk assessment information. While the Biosafety Protocol information regime is aimed in part to assist states considering whether or not to consent to importation of GMOs (states can be regarded as regulatory beneficiaries in these circumstances), it is also accessible and used by other regulatory beneficiaries including consumers and NGOs. Transgovernmental bodies such as the World Bank are increasingly using indicators to rank the performance of governments in achieving development and other goals, and base development assistance grants on their performance.¹⁶ It is likely that indicators will be used in the future as a means for global regulation of private economic actors.

¹⁵ Richard Stewart, Benedict Kingsbury & Bryce Rudyk (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Sustainable Development* (2009 NYUP).

¹⁶ Kevin Davis, Benedict Kingsbury & Sally Engle Merry, "Indicators as a technology of global governance", GAL Working Paper 2010/2, available at the GAL Project website, at <http://www.iilj.org/publications/2010-2.Davis-Kingsbury-Merry.asp>

Network regulatory strategies

In response to the limitations of command regulation, governments have also adopted various forms of networked regulation, making extensive use of private and hybrid public-private institutions, including arrangements for co-regulation. These arrangements seek to economize on the role of enforcement, which inevitably implies an adversary relationship between regulator and the regulated, in favor of non-hierarchical institutional strategies that emphasize cooperation, experimentation, and horizontal information sharing.¹⁷ They are not addressed in this essay, which is focused on public regulatory enforcement. Where domestic governments use networked strategies, however, their implementation and enforcement of transnational regulatory norms may employ these strategies along with one or more of the above regulatory strategies.

Collateral compliance mechanisms mobilized by public regulation

In addition to being enforced by domestic governments, transnational public regulation can also trigger a number of collateral incentives and mechanisms that serve to promote compliance by regulated market actors. Examples (many of which are also applicable to private transnational regulatory regimes) include the following:

- In some fields, transnational standards, notably “technical” standards for product or service identity or quality, can solve coordination problems for firms in the global market place and, as a result, become widely adopted without the need for enforcement actions by public authorities.
- Firms may face market incentives to adhere to transnational public regulatory norms in order to provide credible assurances of quality to supply chain partners, consumers or investors.
- Insurers and third party certifiers may demand compliance with applicable transnational public regulatory standards, such as the standards for preventing oil pollution from ocean vessels.¹⁸
- In order to ensure their own compliance and avoid sanctions, regulated firms often require other firms with whom they contract to certify their compliance with relevant public regulatory standards. These arrangements may extend the effective reach of a transnational regulatory regime beyond the states that have agreed to it, as exemplified by the extension of Basel I bank regulations and Financial Action Task Force anti-money-laundering regulations through the market leverage exercised by financial institutions in the major economies.
- Courts or arbitrators can look to compliance with transnational public regulatory norms when determining liability in contract or tort actions among private parties.
- The information generated in the course of implementing and enforcing transnational public regulatory norms, including information collected and distributed and indicators constructed by transnational regulatory administrative bodies, may lead business partners, consumers and investors to avoid firms with inferior regulatory performance or prefer those with superior performance, and thereby promote compliance by the regulated. Transnational NGOs or associations of socially responsible investors as well as the media may organize and disseminate this information. The compliance push of public regulatory regimes can thereby be extended and enhanced.

As these examples show, transnational public regulatory standards are often enforced against regulated economic actors by other economic actors.

¹⁷ See John Braithwaite, note 5 above; Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union, Towards A New Architecture*, (2010 OUP).

¹⁸ See Kal Raustiala, note 11 above, at 413-415.

Direct enforcement by transnational authorities

Global administrative bodies in public transnational regulatory regimes not only take steps to promote implementation and enforcement by states against regulated actors, but in some instances themselves wield enforcement powers based on their authorities to grant or deny market actors regulatory authorizations which are recognized by states domestically or otherwise have important economic consequences, or to condition financial benefits on compliance with regulatory requirements.

The Kyoto Protocol CDM provides a notable example. The CDM Executive Board establishes and administers rules and procedures for registering projects in developing countries to reduce greenhouse gas emissions, and issuing certified emissions reduction credits (CERs) based on reductions achieved. CERs are internationally traded and commercially valuable because they can be used by firms to help meet their climate regulatory obligations in European countries or are purchased by some developed countries to meet their own Kyoto obligations. CERs provide a significant part of the economic return to CDM project developers and investors. Denial by the CDM of registration or issuance of CERs for failure to meet regulatory requirements is a form of regulatory enforcement against these private economic actors. On the other hand, overgenerous registration or CER certification results in higher emissions, to the detriment of environmental beneficiaries.

Multilateral financial institutions such as the World Bank (including its Prototype Carbon Fund), the International Finance Corporation, the IMF, and the regional development banks also engage in regulatory enforcement through financial conditionality. They deny funding or other financial assistance to projects that fail to meet conditions established pursuant to their social and environmental guidelines. In the case of the IFC, enforcement operates directly against private firms seeking financial assistance from it.¹⁹ The Multilateral Investment Guarantee Agency (MIGA) directly regulates the conduct of private firms undertaking foreign investment, with the grant of its political risk insurance conditional on project compliance with various conditions, such as the requirement to undertake environmental impact assessments.²⁰ The International Bank for Reconstruction and Development (World Bank) and the regional development banks impose conditions on financial assistance to developing country governments for development projects and programs. Because private creditors and investors “piggyback” on Bank assistance for projects or operate under Bank-assisted programs, the conditions effectively regulate these private actors as well. Furthermore, private financial regulatory bodies, such as the Equator Principles Association, adopt the regulatory norms of the IFC and other multilateral institutions and thereby extend their regulatory effect.

Limits to Harmonized Transnational Public Regulation

While transnational harmonization of secondary norms and institutions for domestic implementation and enforcement can make important contributions to substantive regulatory harmonization and efficacy, there are significant limits to such efforts. These limits may be attributable to the desire of states and domestic agencies to maintain future regulatory flexibility, differences in domestic circumstances including legal and administrative systems and traditions, and resistance to dictation of what are regarded as internal matters, especially with respect to administrative and judicial procedures

¹⁹ See IFC “International Finance Corporation’s Performance Standards on Social & Environmental Sustainability”, April 30, 2006. Performance Standards define clients’ roles and responsibilities for managing projects as well as the requirements for receiving and retaining IFC support, in the areas of social and environmental assessment and management; labor and working conditions; pollution prevention and abatement; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resource management; indigenous peoples; and cultural heritage.

²⁰ See MIGA, “Multilateral Investment Guarantee Agency’s Performance Standards on Social & Environmental Sustainability”, October 1, 2007.

and remedies. This discretion can, in turn, spawn implementation and enforcement failures that leave regulatory beneficiaries without protection as well as undermining global regulatory consistency.

Because of the vast differences in the many different types of transnational regulatory regimes, no useful generalizations regarding their performance can be made. The degree of harmonization achieved and the extent to which regimes achieve their stated objectives varies enormously. The field of regulation, the regulatory objective, the identity of the regulated and the conduct regulated, the number, identity, and interests of the states, domestic agencies, and global administrative bodies, participating, the design of the regulatory regime including the instruments used, and transnational implementation and enforcement arrangements are all relevant. The varying priorities of the larger and more powerful states and the diverse configurations of affected economic, NGO, and other organized interests are among the more important factors. Uniformity is never fully achieved, nor would it be desirable in most cases.

Regulatory beneficiaries, organized through domestic and transnational NGOs, have begun in the past two decades to play an important role in promoting more effective implementation and enforcement of transnational regulatory regimes through a variety of advocacy efforts. Many of these efforts build on the implementation and enforcement arrangements developed by transnational regulatory administrative bodies, often in cooperation with them. Regulatory beneficiaries often have a greater interest in stronger regulation than in harmonization as such, but their efforts to promote implementation and enforcement in weaker states may tend to promote a degree of convergence.

V. Remedies and Mechanisms for Protection of Regulatory Beneficiaries

This section focuses on the ability of regulatory beneficiaries to invoke legal procedures and remedies, including administrative law rights of transparency, participation, reason giving and review as well as civil remedies, at both the domestic and transnational levels in order to promote implementation and enforcement of transnational regulatory norms. The basic legal and institutional taxonomy of regulatory beneficiary remedies can be summarized as follows:

Applicable law

Domestic

Transnational

Target of remedy

Domestic administration

Regulated actor

Transnational administration

Court or tribunal providing remedy:

Domestic

Transnational or international

Type of remedy

Government/administrative adherence to procedures for transparency, participation, reason-giving and review

Government/administrative initiation of implementation and enforcement measures and recovery of damages against regulated firms

Beneficiary damages liability against administrative bodies for regulatory failures

Beneficiary damages liability against regulatory violators

Beneficiary injunctive relief against regulatory violators

Beneficiary imposition of penalties against regulatory violators

This section first discusses the availability under domestic law to regulatory beneficiaries of procedural and remedial rights with respect to domestic administrative implementation of transnational regulatory norms. Next, it examines domestic implementation and enforcement rights conferred on regulatory beneficiaries by transnational law. Finally, it considers such rights, whether conferred by domestic or transnational law, with respect to transnational regulatory bodies and officials. All of these different types of rights, insofar as they run against domestic or transnational administrators, include rights within the province of global administrative law, but they can also include rights assertable by regulatory beneficiaries directly against regulated actors.

A. Rights of regulatory beneficiaries under domestic administrative law with respect to domestic administrative implementation of transnational public regulatory norms

1. Remedies afforded under general principles of administrative procedure and judicial review

Although there are some differences among jurisdictions, domestic administrative law generally governs implementation and enforcement of transnational regulatory norms on the same basis as that of domestic norms. Indeed, in very many cases it is not possible to distinguish the two, because domestic officials often use authority already conferred under pre-existing domestic statutes to carry out transnational regulatory undertakings, and may not specifically identify the transnational origin of the norm being applied. Only in relatively few cases (generally in the context of new treaty-based undertakings) is new domestic legislation required such that a regulatory norm's transnational origins are clearly identified. In other cases, the influence on domestic administration decisions of transnational regulatory norms and of decisions by global administrative bodies and tribunals tend to be opaque and difficult to trace.²¹

Under general domestic constitutional and administrative law, regulated actors generally enjoy rights of defense at the stage of government enforcement, including rights to a hearing (either before the agency or in a court or tribunal) and judicial review of legality. These rights may, however, not be available in cases where agencies enjoy broad discretion in the award of funds or other advantageous opportunities. Depending on the domestic legal system, regulated actors may also enjoy procedural rights and rights to review at pre-enforcement stages in the administrative decision making process, such as agency rulemaking or the issuance of authoritative interpretations of applicable law. These various domestic law procedural and review rights may generally be invoked by regulated actors contesting domestic enforcement of transnational regulatory law. One example from Europe is provided by French *Conseil d'Etat* decisions, granting relief to third- country nationals denied visas on the basis of notifications made to the Schengen Information System (SIS).²² *Kadi*²³ and other cases

²¹ See Catherine Redgewell, note 9 above (influence of transnational tribunals' decisions on domestic decision-making). For the problems that this circumstance creates for reviewing courts attempting to review the delegation of regulatory decision-making powers to transnational bodies, see Richard Stewart, "The Global Regulatory Challenge to U.S. Administrative Law", 37 NYU J.Int'l L. & Pol. 695 (2005)

²² The June 1999 cases of *Madame Hamssaoui* and *Madame Forabosco* are discussed in Benedetti M, "The *Conseil d'Etat* and Schengen" in Cassese et al, note 7 above, at 208. The fact that the applicant in one case could not even determine which State had reported her to the SIS led the court to conclude that the decision was insufficiently reasoned, and therefore ought to be annulled. In another case, the Court found that German authorities had made a legal error in reporting the applicant to the SIS.

²³ *Kadi v Council of the European Union and Commission of the European Communities* Case T-315/01 (2005) (Court of First Instance), and Case C-402/05 P (2008) before the European Court of Justice. Other prominent examples relating to the domestic implementation of international sanctions include *Bosphorus Hava Yollari Turzim ve Ticaret AS v. Minister of Transport, Energy and Communications and Others*, 1996 ECR I-3953 ("*Bosphorous*") and *Segi, Aritz Zubimendi Izaga, Aritz Galarraga v Council of the European Union* 2007 ECR I-01657 ("*Segi*"), both of which are discussed, along with *Kadi* in Erika de Wet, "Holding international institutions accountable: the complementary role of non-judicial oversight mechanisms and judicial review" 9 German LJ 1987 (2008).

arising out the Security Council 1267 Committee anti-terrorism regulatory regime pose important issues of the extent to which transnational regulatory law can override rights of enforcement defense under domestic law.

Under the traditional model of constitutional and administrative law in the United States and many other jurisdictions, rights to an administrative hearing and judicial review were generally limited to regulated actors whose liberty or property was the target of government enforcement. Such rights were generally not available to regulatory beneficiaries or other indirectly affected persons, including competitors, although specific statutes might provide such rights in specific circumstances. Over the past 40 years, an interest representation model of administrative law has emerged in the United States, Europe, and many developed countries elsewhere through judicial innovations in doctrines of standing, intervention, reviewability of statutory interpretation and, in some cases, rulings based on constitutional norms or international human rights. As a result of these innovations, the law has extended to regulatory beneficiaries and other indirectly affected interests many rights of participation and judicial review formerly restricted to regulated actors. General systems of public access to government information have also been established. Further, reviewing courts have increasingly recognized that regulatory beneficiaries and other indirectly affected persons as well as the regulated have the right to require regulatory administrative bodies to provide reasoned justifications for their decisions.²⁴

Although there are exceptions, government officials generally have the sole authority (and in many jurisdictions, extremely wide discretion) whether or not to initiate administrative or civil or criminal judicial proceedings for regulatory enforcement. Third parties including regulatory beneficiaries generally do not have the right to intervene in such proceedings or obtain judicial review of officials' prosecutive decisions. However, regulatory beneficiaries often have rights of participation and review with respect to administrative decisions upstream of the enforcement stage, including with respect to the interpretation and implementation of regulatory norms and aspects of the arrangements for implementation, including licensing and monitoring, reporting and other information requirements. Moreover, regulatory beneficiaries often enjoy some rights of participation and judicial review with respect to administrative proceedings to issue or renew or even to revoke the grants of licenses, permits, registrations etc to regulated firms. In such proceedings, beneficiaries can advance their views as to the governing regulatory norms as well as the adequacy of administrative arrangements to ensure compliance. Regulatory beneficiaries may enjoy similar rights with respect to the regulatory conditions that administrators are obliged by law to impose on grants to private actors of financial or other assistance. For example, many jurisdictions require administrators, licensees or grantees to prepare environmental impact statements with respect to projects or activities with significant environmental consequences. In some instances, such requirements have explicit transnational sources, such as the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

In form, these rights on the part of regulatory beneficiaries run against government agencies and officials, and the remedy generally available is to nullify unlawful agency action. But their effect is often to regulate private economic actors undertaking or involved in projects or activities undertaken, authorized or funded by governments.

2. Specific statutory remedies for administrative failure to regulate and enforce

In addition to procedural and review rights applicable to administrative decision-making generally, regulatory beneficiaries may have *private rights of initiation*, in the form of judicially enforceable rights to prod or require administrators to implement and enforce regulatory requirements.²⁵ Such

²⁴ Richard Stewart, "The Reformation of American Administrative Law", 88 Harv. L. Rev. 1669 (1975).

²⁵ Richard Stewart, Cass Sunstein "Public Programs and Private Rights", 95 Harv. L. Rev. 1193 (1982).

rights are, for example, conferred by “citizen suit” provisions in U.S. environmental statutes authorizing “any person” (subject to satisfying constitutional requirements of standing) to bring actions to force administrators to carry out duties imposed by statute, including the initiation of specific regulatory programs or the issuance of implementing regulations in accordance with statutory deadlines.²⁶ Even in the absence of such provisions courts may effectively require initiation of regulatory controls under general principles of administrative law and statutory interpretation. A dramatic example is the recent U.S. Supreme Court decision in *Massachusetts v. EPA*, overturning the EPA’s refusal to initiate regulation of carbon dioxide emissions from motor vehicles.²⁷ The Court did so by rejecting the policy reasons given by the agency for not regulating carbon dioxide as inadmissible under the *Clean Air Act*, and holding that the Act requires such regulation if scientific evidence shows that vehicle emissions endanger public health and welfare. The requirement that agencies give reasons for decisions, including those traditionally regarded as discretionary, has become a potent judicial tool.²⁸

A second innovative remedy for regulatory beneficiaries consists of *private enforcement rights* against regulated actors. Such rights are also conferred by citizen suit provisions in U.S. environmental regulatory statutes authorizing “any person” (again, subject to meeting standing requirements) to bring suit against regulated actors for failure to comply with specific regulatory requirements. Courts may award injunctive relief and impose civil penalties on violators. Successful plaintiffs are entitled to recover attorney fees and litigation costs. It is conceivable that, even in the absence of express statutory authorization, courts might entertain private actions against regulated actors for injunctive relief against regulatory violations.

Private initiation and enforcement rights mobilize private resources and initiative and can remedy gaps and deficiencies in public enforcement. But they are inconsistent with the tradition in many jurisdictions of vesting discretion as to whether or not to initiate enforcement actions to executive or judicial officials and have potential drawbacks. Private rights of initiation may impair responsible officials’ ability to set priorities in deploying limited resources, and override prosecutive decisions to decline enforcement in cases where it would be inequitable or counterproductive. Private enforcement actions also create risks of overbroad enforcement and divergent interpretations of the same regulatory statute by enforcing officials and courts in private actions.

Civil liability actions against public regulatory agencies or officials for regulatory enforcement failures are another potential remedy for regulatory beneficiaries. Such remedies are generally not available in the U.S. but may be available in other jurisdictions, for example against EU member state authorities pursuant to the *Frankovich* principle²⁹.

²⁶ See, for example, Clean Air Act, section 404.

²⁷ 549 U.S. 497 (2007)

²⁸ Other examples of under-protective regulatory regimes that have been successfully challenged since *Massachusetts v. EPA* include *Center for Biological Diversity v. National Highway Traffic & Safety Administration* 538 F.3d 1172 (2008) (in which the Ninth Circuit Court of Appeal required the NHTSA to reconsider its fuel efficiency standards for light trucks) and *Natural Resources Defence Council v. Kempthorne* 506 F.Supp.2d 322 (2007) (in which the District Court held that the Fish and Wildlife Services erred by failing to consider the impact of climate change in a biological opinion concluding that water diversion planned for the California Bay Delta would not jeopardize a listed species). These cases, along with *Massachusetts v. EPA* are discussed in Andrew Long, “Standing and Consensus: Globalism in *Massachusetts v. EPA*” 23 J. Envtl L. & Litig. 73 (2008) and Andrew Long, “International Consensus and US Climate Change Litigation” 33 Wm & Mary Envtl L. & Pol’y Rev. 177 (2008).

²⁹ As enunciated by the European Court of Justice in *Andrea Frankovich v. Italian Republic*, Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357

3. Liability actions against regulated actors for damages caused by regulatory violations

Statutory actions for damages caused by regulatory violations, brought by government officials or private plaintiffs, can also be regarded as a form of regulatory enforcement because the threat of liability often provides a powerful incentive for compliance by regulated actors. In the U.S., some federal and state statutes, including antitrust and consumer protection statutes, authorize private rights of action for damages by injured parties, including consumers and competitors. In some cases, for example under the federal securities laws, courts have implied private rights of action for damages in the absence of any statutory provision authorizing them. In addition, regulatory beneficiaries may use violations by regulated firms as a basis for imposing liability and recovering damages under contract or tort law. Class actions provide a vehicle for imposing collective liability in situations involving large numbers of injured consumers or others with individually small losses; here deterrence goals predominate over compensatory ones. These methods for imposing civil liability based on regulatory violations tap the considerable energies and skills of plaintiffs' lawyers (primarily in the US, but now to some extent elsewhere) and consumer organizations, mobilizing significant private resources for implementation enforcement.

4. Special issues presented by judicial review of domestic administrative decisions involving transnational regulatory norms

As noted above, domestic administrators generally implement and enforce transnational regulatory norms under preexisting statutory and administrative authorities for implementation and enforcement of domestic regulatory norms. In such a context, reviewing courts generally do not treat cases involving transnational norms differently than those involving purely domestic norms. Decisions are beginning to emerge, however, which focus on the distinction between the two types of situations and the possibility of distinctive treatment by reviewing courts of administrative decisions involving transnational regulatory norms, including those adopted by transnational regulatory bodies.

Putting aside important questions of how domestic courts should interpret domestic statutes in cases where transnational norms may apply, and the principles of deference that courts should follow with respect to interpretations of those statutes and norms by domestic agencies and by transnational administrative bodies, domestic courts, as exemplified by U.S. practice, can adopt three basic approaches in reviewing domestic administrative decisions involving transnational regulatory norms. First, courts can review agency decisions applying or refusing to apply transnational norms on the same basis, and apply the same procedural requirements, as in cases involving only domestic law (the "parity" approach). Alternatively, they can hold administrative decisions involving transnational norms to less demanding procedural requirements and apply a more deferential standard of review in cases, in recognition of the Executive's role in foreign affairs (the "parity minus" approach). Finally, they can follow a more demanding approach in cases involving transnational norms, because of concerns over the effective delegation of lawmaking power to the external authorities that adopted the norms in question. In the U.S. experience, the courts have generally followed the first approach or the second.³⁰

A fourth option, reflected in the decision of the U.S. D.C. Circuit decision in *NRDC v. EPA*, is not to recognize transnational regulatory norms at all.³¹ The court rejected a challenge by an environmental NGO to a domestic environmental regulation which, they asserted, allowed farmers to use the fungicide methyl bromide, an ozone-depleting chemical, in greater amounts than authorized under a decision by the Montreal Protocol COP, which established quantitative limits on use of the

³⁰ See Richard Stewart, note 21 above.

³¹ *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir 2006). The concerns with delegation of regulatory authority to extra-statal bodies reflected in the court's opinion parallels those discussed explicitly in the German Constitutional Court's decision in the Lisbon Treaty Judgment (June 30, 2009) regarding the validity under the German Constitution of powers delegated to the European Union.

substance in the US. The court held that the COP decision was a political commitment only and not legally enforceable; in making this ruling it invoked concerns about delegation of regulatory authority to global bodies such as the COP. NRDC subsequently attempted to challenge the EPA's decision on a different ground, namely that it was arbitrary and capricious in light of US agreements with other nations regarding the use of methyl bromide. This challenge was dismissed on the basis that the matter was *res judicata*.³²

There are, contrary to *NRDC*, examples outside the US of decisions rejecting legal challenges to direct domestic enforcement of transnational regulatory norms. For instance, in the, the Dutch Crown, on advice of the Council of State, upheld a decision by the Governor –General of the Netherlands-Antilles to nullify the issue of a lease and building permit to construct a resort immediately adjacent to a Ramsar territory, based on decisions of the COP to the Ramsar Convention that an environmental impact assessment was required in such circumstances.³³

5. Holding domestic administrations to international human rights standards

Regulatory beneficiaries have recently had some success in challenging domestic administrative decisions on the basis of non-compliance with international human rights norms. In *Mazibuko v City of Johannesburg*, the Constitutional Court of South Africa found that a decision by the City to limit the free supply of water to residents to 25 liters per person per day (or 6 kl per household per month) breached the constitutional right to access to adequate water. In determining what would constitute “sufficient water” for the purpose of the Constitution, the Court considered the right to a standard of living adequate for health and well-being under the Universal Declaration of Human Rights and various UN resolutions, the International Covenant on Economic, Social and Cultural Rights, and guidelines of the World Health Organization.³⁴ In *Gbemre v Shell Petroleum Development Company of Nigeria*,³⁵ the Nigerian Federal High Court found that the gas-flaring activities of Shell violated the rights to life and dignity guaranteed by the Nigerian Constitution and reinforced by the African Charter on Human and Peoples' Rights, that the failure of Shell to carry out an environmental impact assessment contributed to this violation, and that domestic legislation allowing gas-flaring in Nigeria was invalid.³⁶

³² 513 F 3d 257 (2008)

³³ The Governor-General of Netherlands-Antilles annulled the lease and permit on the basis that they were contrary to the Ramsar Convention, primarily due to the lack of an environmental impact assessment in accordance with Ramsar guidelines. Notably, the Convention does not explicitly require EIAs, but resolutions and recommendations of the COP include such an obligation. The Crown rejected an appeal by the local authorities, accepting advice from the Council of State that resolutions, decisions and guidelines accepted unanimously by the COP should be considered part of the Netherlands' obligation under the Convention: Newton EC, “Annulment of decisions for building near Ramsar site on Bonaire was justified” 12 November 2007, [\(http://www.ramsar.org/cda/en/ramsar-news-archives-2009-a-ramsar-site-wins-its/main/ramsar/1-26-45-84^18583_4000_0__\(news\)\)](http://www.ramsar.org/cda/en/ramsar-news-archives-2009-a-ramsar-site-wins-its/main/ramsar/1-26-45-84^18583_4000_0__(news)) (archives on the official website of the Ramsar Convention on Wetlands).

³⁴ *Mazibuko v City of Johannesburg* [2009] ZACC 28. The Court set aside the City's decision, made declarations as to what would constitute sufficient water for the terms of s. 27(1) of the Constitution, and ordered the City to reconsider and reformulate its free water policy in light of these declarations.

³⁵ *Gbemre v Shell Petroleum Development Company of Nigeria* B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005, reported in Oxford Reports on International Law, International Law in Domestic Courts. See also discussion in Olufemi O. Amao, “Corporate social responsibility, multinational corporations and the law in Nigeria: Controlling multinationals in host states” 52 *Journal of African Law* 89 (2008), at 102; and Amy Sinden, “The emerging human right to security from climate change: the case against gas flaring in Nigeria” in William C.G. Burns and Hari M. Osofsky (eds), *Adjudicating Climate Change* (CUP 2009), at 173.

³⁶ The applicant acted both for himself, and as a representative of the Iwherekan Community in Delta State, to seek orders enforcing the fundamental rights to life and dignity as provided by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights. The Court found that Shell's gas flaring actions constituted a gross violation of these rights. It also found that Shell's failure to carry out an environmental impact assessment was in clear violation of domestic legislation, and furthermore, contributed to a further

B. Rights conferred by transnational public regulatory regimes on regulatory beneficiaries with respect to domestic administration

Transnational public regulatory regimes are beginning to generate global administrative law requirements and norms that regulatory beneficiaries can invoke in domestic proceedings against government officials to promote or secure implementation and enforcement against regulated actors of substantive transnational regulatory norms. A dramatic example is the TRIPS Agreement, which is a global regulatory regime for the protection of holders of intellectual property rights. TRIPS requires WTO member states to provide IPR holders with a detailed set of informational, procedural and review rights to prevent and redress violations of their rights. WTO member states can invoke the powerful WTO dispute settlement procedures and remedies to promote compliance with these requirements for the benefit of their IPR holders. These and similar, if less far reaching, global administrative law requirements in other WTO agreements, such as the SPS and TBT Agreements, have had broad impacts on domestic regulatory administration in China and other countries, furthering the protection not only of IPR holders but foreign economic actors more generally.³⁷

Another prominent example is the Aarhus Convention, which requires state parties to guarantee environmental groups and individuals access to government environmental information, participation in environmentally-related government administrative proceedings, and rights to review. Rights to information and participation, in environmental impact assessment such as those conferred by the Espoo Convention, are another example of global administrative law in the environmental context. While such rights can generally be asserted only against government authorities, they can be used to help block or secure modifications in environmentally destructive projects licensed or funded by domestic agencies, including by giving NGOs procedure-based bargaining chips. Further, the Aarhus Compliance Committee has ruled that Aarhus procedural norms apply to a private firm carrying out public functions.³⁸

The North American Agreement on Environmental Cooperation (“NAAEC”) establishes an innovative process under which NGOs in any of the three states party to NAFTA may file Citizen Submissions on Enforcement Matters with the Secretariat, asserting that a party is failing to effectively enforce its environmental law. This process can produce an independent review by a NAFTA body of enforcement by the administrative authorities in an NGO’s own state or in another NAFTA jurisdiction, which can in turn create publicity and other pressures for correction.³⁹ A similar mechanism to promote compliance with labor laws by the NAFTA states is established under the Northern American Agreement on Labor Cooperation (“the NAALC”). A still different mechanism is illustrated by the intervention, prompted by NGO lobbying, of the World Heritage Organization into a domestic U.S. controversy over licensing a private gold mining project near Yellowstone National

(Contd.) _____

violation of the fundamental rights in question. While no specific government decision was challenged, the Court found that relevant provisions of domestic legislation permitting gas flaring were inconsistent with the rights to life and dignity, and were thus unconstitutional, null and void. On the basis of these findings, the Court made orders restraining Shell from further flaring of gas in the applicant’s community.

³⁷ Richard Stewart & Michelle Ratton-Sanchez, “The World Trade Organization and Global Administrative Law” in Christian Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing, forthcoming 2011).

³⁸ Marco Macchia, “Legality: The Aarhus Convention and the Compliance Committee”, in Cassese et al, note 7 above, at 71.

³⁹ A similar framework has also been established by the Canada-Chile Agreement on Environmental Cooperation. For discussion of the citizen submission process see Kal Raustiala, “International ‘Enforcement of Enforcement’ Under the North American Agreement on Environmental Cooperation, 36 Va. J. Int’l L. 721, 723 (1996); Marirose J. Pratt, “The citizen submission process of the NAAEC: filling the gap in judicial review of federal agency failures to enforce environmental laws” 20 Emory Int’l L. Rev 741 (2008); and for evaluation of the effectiveness of the process under the NAAEC since its inception see David L. Markell, “The role of spotlighting procedures in promoting citizen participation, transparency and accountability” 45 Wake Forest L. Rev. 425 (2010).

Park by designating the Park as World Heritage site, which ultimately led the project sponsor to abandon it.⁴⁰

Further examples are provided by the following: the ICSID regime provides remedies for foreign investors against domestic governments asserting expropriation of their investments in violation of bilateral investment treaty provisions; claims of expropriation may include challenges to domestic administrative procedures as well as substantive decisions. In a quite different field, athletes subject to disciplinary sanctions may invoke hearing rights against domestic authorities pursuant to the World Anti-Doping Code adopted by the World Anti-Doping Agency and referenced by the UNESCO International Convention against Doping in Sport. Disciplinary decisions by domestic sports authorities are subject to review by the global Court of Arbitration for Sport.⁴¹ The International Labor Organization provides several review mechanisms under which ILO bodies hear complaints filed by trade unions or employer associations that member governments have failed to comply with ILO Conventions.

Another potential avenue for transnational review of domestic regulatory action is through the admission of amici curiae briefs in WTO dispute settlement proceedings, although this possibility is yet to produce any significant outcomes. The Appellate Body confirmed in *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US Shrimp)* (1998) that panels are entitled to accept amicus briefs as part of their general right to seek information, and adopted a procedure for seeking leave to file such briefs in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)* (2000). However, the ability of panels to admit unsolicited submissions from third parties remains contentious among developing country WTO members,⁴² and while panels continue to accept amicus briefs (and emphasize their right to do so), they usually refuse to consider them substantively.⁴³

The proliferation of transnational regulatory mechanisms for review of domestic decisions has created situations where more than one mechanism is applicable to a given case. An example is the Vlora Thermal Power Plant in Albania, where regulatory beneficiaries succeeded in mobilizing both the World Bank Inspection Panel⁴⁴ and the Aarhus Compliance Mechanism⁴⁵, creating a need for the two institutions to coordinate and sequence their review.

⁴⁰ Benedetto Cimini, “Global Bodies Reviewing National Decisions: The *Yellowstone* Case”, in Cassese et al, note 7 above, 192.

⁴¹ See Lorenzo Casini, *Il Diritto Globale dello Sport* (Giuffrè Editore, Milano, 2010).

⁴² See General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60; and WTO, “Participation in dispute settlement proceedings” in *Dispute Settlement System Training Module*, at 9.3.

⁴³ See for example, *US-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel* (May 2000) at paras 39-42 and *US- Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, (January 2004) AB-2003-6 , at para 9; and discussion in Peter Van den Bossche, “NGO involvement in the WTO: a comparative perspective” 11 J. Intl Econ. L 717 (2008), at 738-741; and Yves Bonzon, “Institutionalizing public participation in WTO decision making: some conceptual hurdles and avenues” 11 J. Intl Econ. L 751 (2008), at 758.

⁴⁴ The applicant in both the Inspection Panel and Aarhus processes was a local NGO, representing residents of Vlora affected by the project. The request for investigation made to the Inspection Panel argued that the project was based on a material misrepresentation of the site, that the environmental impact assessment upon which the Bank’s loan was based was misleading and wrong, and that the Bank’s procedures were in violation of Albanian and EU laws relating to the environment, public participation, cultural heritage and EIAs. The Panel ultimately recommended an investigation of several of the matters raised: see World Bank Inspection Panel, “Report and Recommendations, Albania: Power Sector Generation and Restructuring Project (IDA Credit No. 3872-ALB)”, July 2, 2007, Report 40213-AL.

⁴⁵ The Aarhus Compliance Committee found that Albania contravened the Convention by failing to provide adequate opportunities for public participation in decision-making relating to the project, and in its failure to establish a clear, transparent and consistent framework implementing the provisions of the Convention in Albanian legislation: see Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Report by the Compliance Committee, “Compliance by Albania with its obligations under the Convention”, ECE/MP.pp/2008/5/Add 1, 2 April 2008.

C. Rights of regulatory beneficiaries regarding decisions of transnational regulatory administrative bodies

The rapid growth of transnational regulatory administrative bodies has begun to trigger recognition of the need for GAL mechanisms to secure their accountability and responsiveness to affected private actors and interests, including regulated actors and regulatory beneficiaries. Such mechanisms are indeed beginning to emerge. They can provide regulatory beneficiary NGOs with tools to stimulate enforcement by transnational administrative bodies directly against private regulated actors, and to mobilize these bodies to promote implementation and enforcement by domestic authorities.

One type of mechanism is provided by the arrangements adopted by the World Bank, IFC and other multilateral development institutions to ensure compliance by projects receiving financial assistance with the institutions' environmental and social guidelines. These requirements include both procedural requirements, for example to conduct social and environmental impact assessments,⁴⁶ and substantive norms requiring avoidance or mitigation of adverse environmental and social impacts. The World Bank's Inspection Panel, for example, has evolved into a mechanism by which affected residents and environmental and social NGOs in developing countries hosting such projects can promote compliance by participating in the Panel's assessment and review procedures, raising claims of non-compliance, and sometimes by participating in the process of revising projects to promote compliance. Regulatory beneficiaries have procedural rights to participate in the Panel's assessment of compliance, which they can use to create pressures and publicity to obtain modifications of projects or even termination of funding.⁴⁷ The Panel's reports are formally directed at the conduct of the Bank management, and affect funding to developing country governments, but the effect is to secure regulatory compliance by projects which are undertaken or financed in substantial part by private economic actors. The IFC, which provides financial assistance directly to private firms, provides regulatory beneficiaries with similar rights, which they have successfully exercised, for example in the case of a Guatemalan gold mining venture financed by IFC.⁴⁸ Here the connection to private economic actors is more direct.

The Aarhus regime has a non-compliance system that authorizes environmental NGOs to raise claims of non-compliance by state parties with Convention obligations with the Compliance Committee. NGOs also have a right to representation on the committee itself. Thus, the Aarhus regime represents a striking application of GAL mechanisms in favor of regulatory beneficiaries at two levels, domestic administration and transnational administration.

⁴⁶ See David Collins, "Environmental Impact Statements and Public Participation in International Investment Law" 7 *Manchester J. Int'l Econ. L.* 4 (2010) for an overview of World Bank and regional development bank policies that, in particular, impose requirements on firms to assess the environmental impacts of projects and facilitate public participation and stakeholder consultation.

⁴⁷ For further discussion of the Inspection Panel, see Daniel D. Bradlow, David B. Hunter (eds), *International Financial Institutions and International Law*, (Kluwer, 2010), especially Bradlow "International Law and the Operations of the International Financial Institutions", Ch. 1 at 27-28, and Chimni, "International Financial institutions and International Law: A Third World Perspective", Ch. 2 at 48-52; also Dana Clark, Jonathan Fox and Kay Treakle (eds), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, (Rowman & Littlefield, 2003).

⁴⁸ In June 2004, the IFC granted \$45 million in financing to Glamis Ltd in connection with large-scale excavation activities in Guatemala. In January 2005, Colectivo ecologista Madreselva, an NGO representing the interests of the local indigenous peoples, lodged a complaint with the Compliance Advisor Ombudsman (the independent recourse mechanism for the private sector arm of the World Bank) regarding the negative impact of the project on the environment, and inadequate procedures for consultation with indigenous people. The CAO upheld the latter claim, finding the consultation proceedings were inadequate. In subsequent public consultation with the Sikapapa population, organized by the Guatemalan government, 11 out of the 13 voting districts voted against the continuation of mining activities, a result that was subsequently confirmed by the Constitutional Court: Gianluca Sgueo, "Participation of indigenous people: the Guatemala Marlin Gold Mine" in Cassese et al, note 7 above, at 133.

A number of transnational regulatory regimes, such as Codex, provide significant opportunities for participation by NGOs representing beneficiary interests in the adoption of transnational regulatory norms, including in some cases, secondary norms relating to implementation and other steps by participating states or agencies to secure compliance by regulated actors. While these decisions are upstream of enforcement actions by domestic authorities, they have the potential to significantly promote regulatory beneficiary protection.

The Executive Board of the CDM is an example of a global administrative body that exercises direct enforcement authority against private actors, but has no established GAL procedures or judicial review mechanisms to protect the interests of either regulated actors (here, project developers and investors) or regulatory beneficiaries. Two types of proposals have been advanced for review of Executive Board decisions, the first by domestic courts, and the second by a transnational review body established within the Kyoto/CDM regime.⁴⁹ It seems unlikely that this lacuna will persist: the CDM Subsidiary Body for Implementation (SBI) has recently been tasked with developing recommendations for appeal procedures, with a view to the CMP adopting a decision on this issue at its seventh session in 2011.⁵⁰

Concluding Observations

This essay has sought to provide a taxonomy of the various types of procedures and remedies available to regulatory beneficiaries under transnational public regulatory regimes. Although it has found substantial adoption of GAL procedures and remedies in a variety of institutional settings, the essay has not sought to identify or account for any functional or other pattern in the availability of different remedies under different regimes, nor has it sought to develop a systemic analysis of the relative advantages and disadvantages of the different procedures and remedies, their interrelations, and their ultimate contributions to regulatory performance or legitimacy. Nor have any sustained analysis of these questions been found elsewhere in the literature. In these respects, the field of transnational public regulation is far behind that of transnational private regulation, in which much progress has been made, thanks to the work of Professor Cafaggi and his colleagues. The deficit on the public regulatory side may, to some extent be accounted for by the greater range and diversity of public regulation, and the fact that the public authorities that constitute it are also quite diverse. Moreover, the private actors that play such an important role in the constitution and operation of transnational private regulation enjoy, by virtue of private contract and the freedom to create and link various special-purpose private regulatory organizations, much greater institutional flexibility than comparable public actors. This transactional and organizational flexibility may make it easier to develop greater consistency, coherence, and functionality with respect to private regulatory remedies than is possible in the case of public regulation. Courts play an important role in both regimes, but the roles that they play vis-à-vis the private actors and the public authorities that constitute the respective regulatory regimes are very different.

A further matter for future research is the role played by regulatory beneficiary NGOs. The political economy of NGOs is such that they play a far more active role in some areas of regulation, including environmental, labor, and certain types of consumer regulation, than in others. Even in consumer regulation, there is far more NGO interest and activity in, for example, GMO regulation

⁴⁹ Ernestine Meijer, "The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice", 39 *NYU J. Int'l L. & Pol.* 877 (2007).

⁵⁰ Decision -/CMP.6 "Further guidance relating to the clean development mechanism", para 18. The SBI has been directed to take into account the EB's 2010 Annual Report which sets out detailed recommendations for procedures to appeal EB rulings to an "appellate body": see "Annual report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol", FCCC/KP/CMP/2010/10, Annex II "Recommendations on the procedure for appeals against rulings by the Executive Board of the clean development mechanism regarding requests for registration or issuance".

than, for example, the entire fields of financial regulation or competition policy, although the latter has huge consequences for the welfare of consumers. The drivers of these differences in NGO focus, and their implications for the development of private and of public regulation in different fields of regulation, invite examination. In order to develop a more complete and systemic account of transnational public regulation and the role of law in its governance.

Author contacts:

Richard B. Stewart

NYU School of Law

40 Washington Square South, Room 411F

New York, NY 10012-1099

Email : richard.stewart@nyu.edu

